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In the Supreme Court of the United States

OCTOBER TERM, 1989

LOCAL 54, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158 (b)(1)(A), when it imposed fines on union members who, during an economic strike, notified petitioner that they wished to change their status from full membership to financial core membership and then returned to work.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A16) is reported at 887 F.2d 28. The decision and order of the National Labor Relations Board (Pet. App. A17-A21), affirming the decision of the administrative law judge (Pet. App. A22-A38), is reported at 291 N.L.R.B. No. 140.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1989. A petition for rehearing was denied on November 1, 1989 (Pet. App. A1). The petition for a writ of certiorari was filed on January 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Local 54, Hotel Employees and Restaurant Employees International Union, AFL-CIO, and Elsinor Shore Associates T/A Atlantis Casino Hotel were parties to a collective bargaining agreement effective from September 1983 to September 1988. The agreement included a wage reopener clause and a union security provision, which required bargaining unit employees to join the union and remain members in order to retain their employment. In September 1987, in support of economic demands it had advanced in mid-term negotiations, petitioner commenced a strike and established a picket line. The unexpired agreement remained in force throughout the strike. Pet. App. A5, A24-A25.

During the strike, more than 100 bargaining unit employees crossed the picket line and returned to work. Pet. App. A5-A6. Before doing so, each sent the following letter to petitioner (*id.* at A6):

> I am an employee of Atlantis Casino Hotel in Atlantic City, New Jersey. This letter will serve as notification that I am changing my membership status in Local 54, Hotel Employee and Restaurant Employees (H.E.R.E.) International Union from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all

> initiation fees and dues uniformly required of all members [for] maintaining membership. I am not resigning from the union. I am only changing my membership status. I will not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all Local 54 H.E.R.E. members.[1]

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[1] Under Sections 8(a)(3) and 8(b)(2) of the Act, 29 U.S.C. 158(a)(3), 158(b)(2), it is an unfair labor practice for an employer or a union to discriminate against an employee in his employment "to encourage or discourage membership in any labor organization." However, under a proviso to Section 8(a)(3), an employer and a union are permitted to include a union security provision in their collective bargaining agreement—a provision requiring bargaining unit employees to become members of the union within 30 days of employment and to maintain membership as a condition of continued employment—provided that:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *."

In *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963), the Court observed that under Section 8(a)(3), " '[m]embership' as a condition of employment is whittled down to its financial core." "[A]n employee required by a union security agreement to assume financial 'membership' is not subject to union discipline. Such an employee is a 'member' of the union only in the most limited sense." *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 106 n.16 (1985). See also *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). In seeking "financial core" membership, therefore, the employees who crossed the picket line in this case sought to limit their membership in the union to those obligations enforceable consistent with Section 8(a)(3).

Before taking this step, these employees were full members of the union in good standing and were current in their obligation to pay dues. After returning to work, they continued to satisfy their financial obligations to petitioner. *Id.* at A6-A7, A25.

Under petitioner's constitution and bylaws, the timely payment of dues and initiation fees is the only condition for full membership. Neither petitioner's constitution and bylaws nor the collective bargaining agreement refers to any limited form of membership. Pet. App. A7, A25. Petitioner notified each of the nonstrikers that its constitution and bylaws contain no provision for "financial core" affiliation and that the "only level of affiliation which exists is that of a full member based on the payment of required dues and initiation fees." Each nonstriker was also advised that he or she was "still deemed to be a full member of this Union and accordingly bound by the terms and conditions of its By-laws and all obligations arising thereunder." *Id.* at A25-A26.

Thereafter, petitioner notified most of the nonstrikers that it was bringing intra-union charges against them because they had crossed the picket line. After notice and hearing, almost half were notified that they had been found guilty of the charges and fined in amounts ranging from $50 to $1500. Pet. App. A26.

2. The Board, affirming the decision of the administrative law judge, held that petitioner violated Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by rejecting resignations from full union membership, by processing charges against employees who "previously had declared unequivocally their intention to become financial core members," and by fining

them for conduct occurring after that declaration. Pet. App. A17-A18, A33-A34.[2]

The Board rejected petitioner's contention that *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), established petitioner's right to impose discipline upon members who submitted "financial core" letters. The Board acknowledged that under *Allis-Chalmers* "a labor organization may lawfully invoke internal disciplinary machinery against full members, who remain in that capacity, while violating internal rules against strike-breaking." Pet. App. A28. However, the Board continued, subsequent decisions by this Court have manifested "a judicially approved concept of 'voluntarism,' whereby employees are given broad personal discretion to alter their membership and neutralize internal union restric-

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[2] Section 8(b) of the NLRA provides, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

The rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. 157, include:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and * * * to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

tions." *Id.* at A29. The Board noted that in *Carpenters District Council for Seattle (Gordon Construction)*, 277 N.L.R.B. 530 (1985), and *Carpenters Local 470 (Tacoma Boatbuilding)*, 277 N.L.R.B. 513 (1985), it had held that under that policy of voluntarism, employees "who remain members [of a union], but declare financial core status, thereafter * * * are exempt from union prohibitions." Pet. App. A29. The Board found those decisions dispositive of this case.

The Board added that, under petitioner's view, "the union shop arrangement would limit the unwitting member to two choices; i.e. support the strike or resign from full membership and risk discharge," and that, if accepted, petitioner's view "would broaden the enforceable scope of the union shop clause by approving it as an instrumentality for the indirect enforcement of nonfinancial union regulations." Pet. App. A31.

3. The court of appeals enforced the Board's order. After reviewing the relevant decisions of this Court and the basis for the Board's decisions in *Tacoma Boatbuilding* and *Gordon Construction* (Pet. App. A10-A13), the panel approved the Board's position that employees subject to a union security provision must be allowed to assume financial core membership in a union. The court reasoned that "if striking members enjoy a statutorily protected right to change their minds and return to work after communicating their resignations, that choice ought to be, and is free of job loss constraints" (*id.* at A15). The court rejected petitioner's contention that "allowing financial core membership regardless of whether it is provided in the union shop agreement interferes with the process of collective bargaining." *Ibid.* The panel found that contention to be foreclosed by prin-

ciples recognized in this Court's cases (*id.* at A15-A16):

> First, the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. Second, membership as a condition of employment has been whittled down to its financial core. Third, a distinction exists between full membership and financial core membership. Fourth, an employee required by a union security agreement to assume financial core "membership" is not subject to union discipline.

ARGUMENT

Under Section 7 of the NLRA, 29 U.S.C. 157, employees have the right to engage in or refrain from concerted activities, including strikes, and it is generally an unfair labor practice for a union to restrain or coerce an employee in the exercise of that right, 29 U.S.C. 158(b)(1)(A); see *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 101 (1985). Although any form of union discipline for a refusal to participate in a strike could be said to restrain the exercise of the right not to strike, this Court has recognized that Section 8(b)(1)(A) does not foreclose all strike discipline. In *NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, the Court held that Section 8(b)(1)(A) does not prohibit a union from disciplining employees who cross a picket line while they are full union members. See 388 U.S. at 196-197 & n.37.

As the Board and the court of appeals noted, however, this Court's subsequent decisions establish limits on a union's power to punish nonparticipation in a strike. In *NLRB* v. *Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213

(1972), the Court held that a union could not discipline an employee who had resigned from the union before returning to work during a strike, where resignations were not prohibited by the union constitution. The Court explained that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." *Id.* at 217. Further, in *Pattern Makers*, the Court held that "a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." 473 U.S. at 101. The Court explained that Section 8(b)(1)(A) of the Act does not authorize unions to restrict the right to resign and that enforcement of such restrictions would be "inconsistent with the policy of voluntary unionism implicit in § 8(a)(3)." 473 U.S. at 102-103, 104. In enacting that Section, the Court declared, "Congress * * * sought to eliminate completely any requirement that the employee maintain full union membership." *Id.* at 107. Thus, a union is free to enforce only "a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union and escape the rule.*" *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969) (emphasis added).

Relying upon principles recognized in *Textile Workers*, *Scofield*, and *Pattern Makers*, the Board has held that the Act does not allow a union to impose discipline for nonparticipation in a strike on employees who first relinquish full membership in the union in favor of financial core membership. *Carpenters District Council for Seattle (Gordon Construction)*, *supra*; *Carpenters Local 470 (Tacoma Boat-*

building), supra. The Board adhered to that interpretation of the statute in this case—and also reaffirmed that a union may not deny core financial membership to those employees who wish to adopt it. See Pet. App. A29-A32.

Petitioner acknowledges implicitly that *Pattern Makers* allows an employee to avoid union discipline by resigning from a union altogether and that a union may not restrict the right to resign, but it argues that Section 8(b)(1)(A) of the Act permits a union to refuse to recognize financial core members who are immune from discipline. Pet. 9-10. Emphasizing that its members are free to resign (Pet. 5, 15), petitioner argues that *Allis-Chalmers* recognizes its "right to impose reasonable discipline on members who do not obey [union] rules." Pet. 11. As the Board has recognized, however, acceptance of this position would subject employees who are subject to a union security provision to a Hobson's choice. Employees would be forced to choose between full union membership, accompanied by exposure to union discipline, and possible loss of employment. The Board's refusal to require such a choice is entirely reasonable and consistent with this Court's decisions.[3]

The approach that the Board has fashioned for cases of this kind is a reasonable accommodation of Section 8(a)(3)'s limited authorization of union security clauses and of the policy of voluntary unionism, recognized in *Pattern Makers*, that this Section

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[3] In *Pattern Makers*, the resignations and subsequent refusals to honor the picket line occurred after the expiration of the collective bargaining agreement. 473 U.S. at 97. The Board has held that a union security provision in an expired agreement is not enforceable; thus, the employees who resigned from the union in *Pattern Makers* were not exposed to discharge on account of such a provision.

also embodies. Under Section 8(a)(3), a union and an employer are permitted to enter into a union security provision that requires membership in a union as a condition of employment, but enforcement of such a provision is permitted only in cases in which an employee has refused to comply with his obligation to pay union dues. As *Pattern Makers* noted, 473 U.S. at 107, Congress's intention in enacting this provision was "to eliminate completely any requirement that the employee maintain full union membership." If a union were free to refuse to recognize the limited form of membership contemplated by Section 8(a)(3), employees would be effectively compelled—contrary to *Pattern Makers*—to maintain full membership in order to avoid the possibility of discharge. Thus, the approach that the Board has followed in *Tacoma Boatbuilding*, *Gordon Construction*, and this case is a logical corollary of *Pattern Makers*.[4]

The Board's position does not interfere with the authority that Section 8(b)(1)(A) reserves to unions to prescribe rules "with respect to the acquisition or retention of membership therein." See Pet. 9-10. In *Pattern Makers*, the Court explained that the rules encompassed by this provision are "those that provide for the expulsion of employees from the union." 473 U.S. at 109. *Pattern Makers* also disposes of petitioner's related contention (Pet. 10) that the "disciplinary proceedings and penalties" that fol-

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[4] Indeed, as a practical matter, there is little difference in substance between resignation and adoption of financial core status. An employee who chooses that status is not subject to the burdens and does not enjoy the benefits of full union membership; he thus remains "a 'member' of the union only in the most limited sense." *Pattern Makers*, 473 U.S. at 106 n.16.

lowed petitioner's refusal to recognize "financial core" status were "internal proceedings and did not impact upon such members' employment rights vis-a-vis the employer." There, the Court rejected the argument that when "offending members are not discharged, but only fined" there is no interference "with workers' employment rights." 473 U.S. at 107. Moreover, as the Board found and the court of appeals agreed, the union's refusal to recognize financial core status did affect the nonstrikers' employment rights in this case because they risked job loss if they resigned their union membership.

Petitioner's additional contention (Pet. 11-12) that the decision below interferes with its ability to perform its collective bargaining responsibilities and deprives it of the fruits of collective bargaining is also without merit. Consistent with Section 8(a)(3), a union and an employer may not enforce a union security clause that requires any obligation other than financial support. *General Motors Corp.*, 373 U.S. at 742; see note 1, *supra*.[5]

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[5] Petitioner's reliance (Pet. 11, 14) on *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), is misplaced. In that case, the employees who were disciplined had elected to acquire and retain "full union membership," 388 U.S. at 196, and the Court expressly reserved the question whether discipline could be imposed "on members whose membership was in fact limited to the obligation of paying monthly dues," *id.* at 197. See *NLRB* v. *Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213, 215 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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